No. ~~970~~ 52

In the Supreme Court of the United States

OCTOBER TERM, 1940

THE UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, APPELLANTS

v.

N. E. ROSENBLUM TRUCK LINES, INC.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MISSOURI

STATEMENT AS TO JURISDICTION

In the District Court of the United States for the Eastern District of Missouri, Eastern Division

CIVIL ACTION NO. 599

N. E. ROSENBLUM TRUCK LINES, INC., A CORPORATION, PLAINTIFF

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, DEFENDANTS

JURISDICTIONAL STATEMENT BY THE DEFENDANT-APPELLANTS UNDER RULE 12 OF THE REVISED RULES OF THE SUPREME COURT OF THE UNITED STATES

(Filed March 13, 1941)

The defendant-appellants respectfully present the following statement disclosing the basis upon which it is contended that the Supreme Court of the United States has jurisdiction upon appeal to review the final judgment or decree in the above-entitled cause sought to be reviewed:

A. Statutory provisions

The statutory provisions believed to sustain the jurisdiction are:

U. S. C., Title 28, Sec. 47a (Act of March 3, 1911, c. 231, Section 210, 36 Stat. 1150; as amended by

Urgent Deficiencies Act of October 22, 1913, c. 32, 38 Stat. 220).

U. S. C., Title 28, Section 41 (28) (Act of June 18, 1910, c. 309, 36 Stat. 539; as amended March 3, 1911, c. 231, Section 207, 36 Stat. 1148; October 22, 1913, c. 32, 38 Stat. 219).

U. S. C., Title 28, Section 44 (Act of October 22, 1913, c. 32, 38 Stat. 220; as amended by Act of February 13, 1925, c. 229, Section 1, 43 Stat. 938).

U. S. C., Title 28, Section 47 (Act of October 22, 1913, c. 32, 38 Stat. 220).

U. S. C., Title 28, Section 345 (Act of March 3, 1891, c. 517, Section 5, 26 Stat. 827; as amended January 20, 1897, c. 68, 29 Stat. 492; April 12, 1900, c. 191, Section 35, 31 Stat. 85; April 30, 1900, c. 339, Section 86, 31 Stat. 158; March 3, 1909, c. 269, Section 1, 35 Stat. 838; March 3, 1911, c. 231, Sections 238, 244, 36 Stat. 1157; January 28, 1915, c. 22, Section 2, 38 Stat. 804; February 13, 1925, c. 229, Section 1, 43 Stat. 938).

B. Date of the judgment or decree sought to be reviewed and the date upon which the application for appeal was presented

The decree sought to be reviewed was entered on January 20, 1941. The petition for appeal was presented on March 13, 1941, together with an assignment of errors.

C. Nature of cause and of rulings below

This is an appeal from a decree of the District Court of the United States for the Eastern Divi-

sion of the Eastern District of Missouri entered January 20, 1941, granting the prayer of a complaint which was filed in said court in the above-styled proceeding by the above-named plaintiff under and pursuant to the provisions of Section 41 (28) and Sections 43 to 48, inclusive, of Title 28, U. S. C.

Said complaint prayed that said District Court enjoin, set aside and annul an order of the Interstate Commerce Commission entered July 1, 1940, in proceedings entitled *N. E. Rosenblum Truck Lines, Inc. Contract Carrier Application*, No. MC 13853 (reported 24 M. C. C. 121), insofar as said order and its accompanying report found that the said applicant had failed to establish its right to a permit to operate as a contract carrier under the "grandfather" clause of Section 209 (a) of the Motor Carrier Act, 1935, and denied said application. The complaint filed in the above-named District Court alleged, among other things, that the Commission's said order was erroneous in law, and that in the light of the undisputed facts shown in evidence before the Commission, the plaintiff was and is entitled to a permit as aforesaid, and that by reason of the said order of the Commission the plaintiff would suffer great irreparable injury to its business.

The case was heard upon final hearing before a court of three judges organized pursuant to U. S. C. Title 28, Section 47 (Urgent Deficiencies Act of October 22, 1913, c. 32, 38 Stat. 220). A

transcript of all the evidence received before the Interstate Commerce Commission, duly certified by the Secretary of the Commission, was received in evidence before said court. Thereafter, on January 14, 1941, the court rendered its opinion holding that the prayer of the complaint should be granted, and made its findings of fact and conclusions of law, and on January 20, 1941, the court entered the final decree sought to be reviewed.

The questions presented by this appeal are substantial. They involve the duties and powers of the Interstate Commerce Commission with respect to the issuance of permits for contract carriers under the so-called "grandfather" clause of Section 209 of the Motor Carrier Act, 1935. They also involve the duties and functions of the District Court with regard to the weighing of evidence heard by the Interstate Commerce Commission in suits involving the validity of the action of the Commission in denying or granting applications for contract carrier permits under said "grandfather" clause.

D. Cases sustaining the Supreme Court's jurisdiction on appeal

United States v. *Chicago, Milwaukee, St. Paul & Pacific R. R. Co.*, 294 U. S. 499.

United States v. *Baltimore & Ohio R. R. Co.*, 293 U. S. 454.

Florida v. *United States*, 282 U. S. 194.

Beaumont, Sour Lake & Western Ry. Co. v. *United States*, 282 U. S. 74.

Ann Arbor Railroad Co. v. *United States*, 281 U. S. 658.

Louisville & Nashville R. R. Co. v. *United States*, 238 U. S. 1.

Interstate Commerce Commission v. *Union Pacific Ry Co.*, 222 U. S. 541.

United States v. *Maher*, 307 U. S. 148.

E. Decree and opinion of the District Court

Appended to this statement is a copy of the opinion of the District Court with its findings of fact and conclusions of law and a copy of the decree of said court sought to be reviewed.

We, therefore, respectfully submit that the Supreme Court of the United States has jurisdiction of the appeal.

Dated March 13, 1941.

Respectfully submitted.

FRANCIS BIDDLE,
Solicitor General,

HARRY C. BLANTON,
United States Attorney,

THURMAN ARNOLD,
Assistant Attorney General,

FRANK COLEMAN,
Special Assistant to the Attorney General,
For the United States of America.

DANIEL W. KNOWLTON,
Chief Counsel,

NELSON THOMAS,
Attorney,
For the Interstate Commerce Commission.

In the District Court of the United States for the Eastern Division of the Eastern District of Missouri

---

No. 599

N. E. ROSENBLUM TRUCK LINES, INC., A CORPORATION, PLAINTIFF

v.

UNITED STATES OF AMERICA AND THE INTERSTATE COMMERCE COMMISSION, DEFENDANTS

No. 601

J. B. MARGOLIES, AN INDIVIDUAL DOING BUSINESS AS MANHATTAN TRUCK LINES, PLAINTIFF

v.

UNITED STATES OF AMERICA AND THE INTERSTATE COMMERCE COMMISSION, DEFENDANTS

Appearances:

J. C. Hopewell, Esq., M. E. Arnoff, Esq., and Gus. O. Nations, Esq., attorneys for plaintiffs.

Thurman Arnold, Assistant Attorney General, Harry C. Blanton, United States Attorney, Daniel W. Knowlton, Chief Counsel, Interstate Commerce Commission, Frank Coleman, Special Assistant to the Attorney General, and Nelson

Thomas, Attorney, Interstate Commerce Commission, attorneys for defendants.

Before Joseph W. Woodrough, Circuit Judge, Charles B. Davis and George H. Moore, District Judges, on applications for injunctions.

The complainants sought Certificates of Convenience and Necessity or Permits before the Interstate Commerce Commission on the theory that on July 1, 1935, they were operating as contract carriers by motor vehicles, within the meaning of the Motor Carrier Act, 49 U. S. C. A. 303, over the route for which application was made, and had so operated since that time.

The Commission denied the applications. The complainants filed separate suits in the District Court to set aside the orders of the Commission. The cases were heard by a Court composed of three judges under the Motor Carrier Act, 49 U. S. C. A. 305 (h), and the Act providing for such a court, 28 U. S. C. A. 46, 47. The two cases were jointly argued and briefed, and will be so treated in this opinion. However, separate findings of fact and conclusions of law are being filed herewith, to which reference is made without extended restatement.

That orders of the nature here involved are reviewable in this Court has been determined in *United States* v. *Maher*, 307 U. S. 148. However, the judicial function is limited to an examination of the record to ascertain whether there is a sub-

stantial basis in the evidence for the conclusion of the Commission. *Rochester Telephone Corporation* v. *United States*, 307 U. S. 125.

The Act provides in substance that a contract carrier must secure a permit to operate, but if such carrier or his predecessor in interest were operating on July 1, 1935, over the route for which application is made, and have so operated since that time, the Commission shall issue the permit without further proceedings. Section 309 (a). The complainants sought to avail themselves of this privilege granted by the law. The question is Were they contract carriers on July 1, 1935, and have they so operated since that time?

The Interstate Commerce Commission held that the complainants were owner-operators, but were not contract carriers. As their conclusion is understood, it is based upon the theory that complainants merely provided trucks to common carriers, who in the course of operation had exclusive control and dominion of the same.

Smythe Contract Carrier Application, 22 M. C. C. 726, and Dixon Contract Carrier Application, 21 M. C. C. 617, are relied upon as supporting the orders entered in these cases. In the Smythe case the Commission stated the facts as follows:

> Under the terms of the lease, which is verbal, the cartage company has complete control and supervision of applicant's equipment, and directs the movement thereof, the same as if the trucks were owned by it.

> Such equipment is used exclusively in the service of the cartage company and is operated under its name. The upkeep and operating expenses and the drivers' wages are paid by applicant, the Cartage Company secures all traffic and pays applicant for the use of his equipment, 80 percent of its rate for the transportation performed. All bills of lading are issued by and in the name of the Cartage Company, which collects the transportation charges, is liable for loss and damage claims, and provides an pays for all insurance and State License tags or fees assessable in any States in which the vehicle is operated. All transactions with shippers are carried on in the name of the cartage company.

On this state of facts the Commission in that case denied a permit to the owner of the equipment.

The salient facts should be mentioned to determine whether the same situation exists in the cases now before the Court.

The complainants, prior to July 1, 1935, and thereafter, owned trucks on which they paid the vehicle license fees, which trucks were used by common carriers to transport freight between St. Louis and Chicago. The shipments went forward in the names of the common carriers, who supervised the loading and unloading of the trucks and collected the charges. Complainants were paid an amount for each trip, dependent upon the weight of the

load carried and the compensation derived from its carriage. Complainants carried fire, theft, and collision insurance on their equipment, and while public liability and cargo insurance were taken out in the first instance by the common carriers, the cost of such insurance was charged to the complainants. The cargo insurance covered only damage over the sum of $100.00, and complainants agreed with the carriers to be responsible for damage under that sum, and were in some instances compelled to pay such losses. The drivers of the trucks were employees of complainants, who hired, paid, and discharged them. The complainants were free to take any route they chose between the designated points, and there were two or more routes available between the two cities. The common carriers exercised no control over the routing, except to request on occasions that drivers register at certain stations along the road. In some instances the complainants had a full load from one common carrier, and at other times they had fractional loads for one, two, or more carriers on the same truck on the same trip. At no time were the trucks of complainants in the exclusive service of any common carrier.

Under these circumstances were complainants Contract Carriers? The statute defines a contract carrier (49 U. S. C. A. 303):

> The term "contract carrier by motor vehicle" means any person not included under

> paragraph (14) of this section, who or which, under special and individual contracts or agreements, and whether directly or by a lease or any other arrangement, transports passengers or property in interstate or foreign commerce by motor vehicle for compensation.

The Act carries its own limitations. The section defining terms used excludes from the operation of the law, "the casual, occasional, or reciprocal transportation of passengers or property in interstate or foreign commerce for compensation by any person not engaged in transportation by motor vehicle as a regular occupation or business." Sec. 303 (b). Consequently one who occasionally furnishes equipment for interstate transportation does not come within the Act. It cannot be said that if permits are granted in these cases, they must be granted in every instance where on July 1, 1935, a person or corporation permitted his or its trucks to be used in interstate hauling. The person permitting his trucks to be used must have been engaged in the transportation business as a regular occupation or business. In these cases there is no question but that complainants qualify in this regard.

The defendants contend that the purpose of the "grandfather clause" in the Motor Carrier Act was to allow only those carriers who had been dealing with *shippers directly* on July 1, 1935, to continue their operations without a determination of convenience and necessity. The Act itself refutes

this argument, in that it recognizes that persons often act as brokers of motor transportation, and requires that such persons take out brokers' licenses. Although these persons deal directly with the shippers, they are not required to obtain common or contract carriers' licenses; on the contrary, the Act provides that the persons to whom the brokers turn over their business must have a carrier's license.

Section 303 (18), U. S. C. A. 49, provides:

> The term "broker" means any person not included in the term "motor carrier" and not a bona fide employee or agent of any such carrier, who or which, as principal or agent, sells or offers for sale any transportation subject to this chapter, or negotiates for, or holds himself or itself out by solicitation, advertisement, or otherwise as one who sells, provides, furnishes, contracts, or arranges for such transportation.

Section 311 (b) provides for the issuance of licenses to brokers upon qualifying under the Act.

In thus recognizing that common and contract carriers need not contract directly with the shipping public, but that such contracts may be made through third persons, such as brokers, Congress has shown a clear intention that licensing of carriers should not be affected by the fact that dealings were not had directly with shippers. Nothing in the statute indicates that a carrier must deal directly with the shipper in order to be entitled to a license under the Act.

In *United States* v. *Brooklyn Eastern Terminal*, 249 U. S. 396, it was held that the Terminal was a carrier though not organized or held out as such, and though it had not filed tariffs nor undertaken to transport property for all who applied, but merely carried freight as agent for certain railroads with which it had made special contracts. See also *United States* v. *California*, 297 U. S. 175; *Union Stock Yard & Transit Co.* v. *United States*, 308 U. S. 213, l. c. 220. It was not the method of fixing charges, nor the parties with which complainants contracted, but what they did, that characterized their undertaking.

The complainants transported freight in interstate commerce for compensation under agreements with common carriers. They actually engaged in the business of transportation. In so doing they provided the trucks and drivers, paid the license fees for using the highways, and assumed the responsibility for loss or damage to freight entrusted to them. This obligation they discharged both by carrying insurance and by payment of losses. The trucks were not used exclusively by any one common carrier, but by several. Even when called by one carrier, on some occasions the use of the trucks on the particular trip was not limited to the service of that carrier, but the freight of other carriers was transported in the same truck at the same time. These facts show that the control of the equipment was

in the hands of complainants, and not in the hands of the common carriers.

Complainants were, under the evidence, contract carriers on July 1, 1935, and have so operated since that time. Their status has not been changed by the subsequent extension of their business, as the statute does not restrict the right of the carrier to add to his or its equipment and facilities over the routes, between the termini or within the territory specified in the permit, as the development of the business and the demands of the public shall require. Sec. 309 (b).

The statute says if they transport freight under special agreements "directly or by a lease or any other arrangement" for compensation, they are contract carriers. This language is broad. Congress purposely so provided. It may be that the administrative process would be simpler had the statute been made to read otherwise. It might have been better to further limit the number of motor carriers, but this is not for the Court to say. Congress enacted the statute; it means what it says.

The conclusion seems inevitable that the common carriers did not have exclusive control of and dominion over the trucks of complainants while they were engaged in the transportation business, and that the conclusion of the Commission to that effect has no substantial basis in the evidence offered.

The prayer of the complaints will be granted to the extent of setting aside the orders entered. Judgments accordingly may be tendered for approval, signature, and entry.

(s) CHARLES B. DAVIS,
(s) GEO. H. MOORE,
United States District Judges.

(s) JOSEPH W. WOODROUGH,
United States Circuit Judge.

In the District Court of the United States for the Eastern Division of the Eastern District of Missouri

No. 599

N. E. ROSENBLUM TRUCK LINES, INC., A CORPORATION, PLAINTIFF

v.

UNITED STATES OF AMERICA AND THE INTERSTATE COMMERCE COMMISSION, DEFENDANTS

Before Joseph W. Woodrough, Circuit Judge, Charles B. Davis and George H. Moore, District Judges, on application for injunction.

FINDINGS OF FACT

1. That plaintiff, a corporation organized under the laws of Missouri, is successor in interest to N. E. Rosenblum, an individual heretofore doing business as N. E. Rosenblum Truck Lines. Plaintiff brings this action under Section 24 and 209 of the Judicial Code (28 U. S. C. A., Sections 41, 44, and 45) to review, enjoin, suspend, and set aside an order of the Interstate Commerce Commission entered on July 1, 1940, in a proceeding entitled MC-13853, N. E. Rosenblum Truck Lines, Inc., Contract Carrier Application, wherein applicant was denied a certificate of public convenience and necessity or a permit authorizing continuance of opera-

tions as a common or a contract carrier by motor vehicle of general commodities, in interstate or foreign commerce, between St. Louis, Mo., and Chicago, Ill., over certain specified routes.

2. That the Commission concluded from the evidence that: "It is clear from the record, and we so conclude, that applicants' equipment prior to February 1936 was operated solely under the direction and control of the common carriers and under the latter's responsibility to the general public and to the shippers. As to such operations, applicants do not qualify as carriers by motor vehicle within the meaning of the act and are consequently not entitled to a certificate or a permit under the 'grandfather' clause of section 206 (a) or 209 (a) thereof."

3. That said Rosenblum, prior to July 1, 1935, operated three tractor-trailer units as a regular occupation or business, hauling freight between the points in question for large truck companies, principally for Transamerican Freight Lines, Inc. Plaintiff introduced testimony that he had hauled for various other truck lines prior to that date, and the evidence of protestants to dispute this testimony showed only that he had hauled no freight for some of such other companies *after* July 1, 1935. In so hauling for said carriers, Rosenblum was paid a lump sum per trip on dock-to-dock movements. He carried fire, theft, and collision insurance on his equipment, while the

insurance on the cargo and public liability insurance were ordinarily taken out in the first instance by Transamerican or other carriers for which Rosenblum was working, the amount of such insurance being charged to and paid by Rosenblum. The cargo insurance covered only damage above the sum of $100.00; and Rosenblum agreed with the common carrier to be responsible for damage under that sum, and was so held liable under that agreement in one instance. Drivers of the trucks were employees of Rosenblum, but the loading and unloading of trucks and sealing of trailers on each trip were handled by the common carriers. Expenses of maintenance and upkeep on the equipment, and costs of travel, were paid by Rosenblum. Registration on the trucks was obtained from the State authorities by Rosenblum. The latter was ordinarily free to take any route he chose between the designated points, and the common carrier exercised no control over the routing of his trucks, except to request that most of the trucks register at registration stations at certain points en route. Protestants' own witness testified that the common carrier did not usually designate the specific routes to be taken by Rosenblum's trucks. The common carriers called upon plaintiff to haul cargoes when traffic was heavy and extra trucks were needed to handle the business. In some instances Rosenblum carried half of a load for one carrier and half for another, or other fractional loads for

various carriers. The compensation to Rosenblum varied according to the particular load and the profits received by the common carrier.

4. That prior to July 1, 1935, and since that time, Rosenblum's equipment was operated principally under his own direction and control, and on his own responsibility.

CONCLUSIONS OF LAW

1. That this Court has jurisdiction to entertain plaintiff's petition to enjoin the enforcement of and set aside the order of the Interstate Commerce Commission of July 1, 1940, denying to plaintiff a certificate of convenience and necessity or a permit.

2. That plaintiff or its predecessor was in bona fide operation as a contract carrier in interstate commerce on July 1, 1935, over the routes for which application is made, and has so operated since that time; that plaintiff in so operating assumed control, management, and responsibility for the hauling of cargo.

3. That there is no substantial evidence in the record to support the order entered, and that plaintiff is entitled to an order enjoining, suspending, and setting aside the order of the Interstate Commerce Commission.

(s) JOSEPH W. WOODROUGH,
United States Circuit Judge.

(s) CHARLES B. DAVIS,

(s) GEO. H. MOORE,
United States District Judges.

In the District Court of the United States for the Eastern Division of the Eastern District of Missouri

---

No. 599

N. E. ROSENBLUM TRUCK LINES, INC., A CORPORATION, PLAINTIFF

v.

UNITED STATES OF AMERICA AND THE INTERSTATE COMMERCE COMMISSION, DEFENDANTS

Before Hon. Joseph W. Woodrough, United States Circuit Judge, Hon. Charles B. Davis, United States District Judge, and Hon. George H. Moore, United States District Judge, sitting as the District Court of the United States for the Eastern District of Missouri, pursuant to the provisions of Sections 208 and 209 of the Judicial Code, 28 U. S. C. A. 44, 45, and 47.

FINAL DECREE AND JUDGMENT

This cause came on for hearing on the complaint of the plaintiff on December 9, 1940, when the plaintiff appeared by its solicitors of record, the United States of America and the Interstate Commerce Commission appeared by their respective solicitors of record, and, the transcript of proceedings and evidence had and presented be-

fore the Interstate Commerce Commission on plaintiff's application to the Commission for a permit to continue in business as a contract carrier of freight by motor vehicle, was by the plaintiff offered in evidence, the defendant admitting that said transcript contained a complete record of all the evidence presented therein before the Interstate Commerce Commission, and the cause was presented by the parties to the Court for determination, under the pleadings filed and the proof then adduced and the arguments of the parties, as well as briefs thereafter filed by the parties.

And, the Court being fully advised in the premises, and having filed herein on January 14, 1941, its findings of fact and conclusions of law as well as its written opinion holding that there is no substantial evidence in the record of proceedings before the Interstate Commerce Commission to support the findings and conclusions on which the order of the Commission is based, and that the Commission by said order erred in its conclusion of fact and in the application of the controlling law, and that because of said erroneous finding, conclusion, and order the plaintiff is entitled to have said order enjoined, annulled, and set aside; now,

THEREFORE, IT IS ADJUDGED AND DECREED that the order of the Interstate Commerce Commission made July 1, 1940, in the proceeding before said Commission entitled "No. MC–13853, N. E. Rosen-

blum Truck Lines, Inc., Contract Carrier Application, St. Louis, Missouri," denying the application of N. E. Rosenblum Truck Lines, Inc., for a certificate or permit as a contract carrier, be, and it is hereby, annulled and set aside, the defendants are enjoined from enforcing or attempting to enforce said order.

Done this 20th day of January 1941.

For the Court:

GEO. H. MOORE,
Judge.

U. S. GOVERNMENT PRINTING OFFICE: 1941